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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 913

ANCHOR LINE, LIMITED, et al., *Petitioners*

v.

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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SUBJECT INDEX

	Page
Opinions of the Court and Agency Below	2
Grounds on Which Jurisdiction is Involved	2
Questions Presented for Review	2
Constitutional Provisions, Statutes and Rules Involved	3
Statement of the Case	4
Reasons for the Allowance of the Writ	9
Conclusion	30
Appendix	A. 1

Table of Cases and Statutes Cited

National Labor Relations Board v. Fant Milling Company, 360 U.S. 301 (1959)	15
Public Utility District No. 1 of Douglas County, State of Washington v. Federal Power Commission, 242 F. 2d 672 (9th Cir. 1957)	21
United States v. L. A. Tucker Truck Lines, 344 U.S. 33 (1952)	21
Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474 (1951)	26, 28, 29
Constitution of the United States, Amendment V	16
Shipping Act, 1916	
Section 1	22
Section 15	4, 7, 10, 12
Section 22	14, 16
Sections 14, 14(a), 14(b), 16, 17, 18(b), 20, 21, and 32	16, 17
Administrative Procedure Act, Section 8(b)	18
Review Act of 1950	6
Federal Maritime Commission Rule 16(a)	7, 18, 20

APPENDIX: Page

Opinion of the Court Below ..... A. 1
Constitutional Provisions, Statutes and Rules Involved ..... A. 4
U. S. Constitution Amendment V ..... A. 4
Shipping Act, 1916 ..... A. 4
Section 1 ..... A. 4
Section 15 ..... A. 5
Section 22 ..... A. 7
Administrative Procedure Act, Section 8(b) ... A. 7
Federal Maritime Commission Rule 16(a) ..... A. 8

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case.

OPINIONS OF THE COURT AND AGENCY BELOW

The opinion of the Court of Appeals for the District of Columbia is reported at 299 F. 2d 124, and is also printed in the Appendix to this Petition. References to portions thereof will be made as follows: (A.). Both the first Report and Order and the Second Report and Order of the agency below are contained in the record as printed for the use of the court below. (R. 425 and R. 479). Nine copies of that record have been filed with this Petition, and references herein to pages of that record will be made as follows: (R.).

GROUNDS ON WHICH JURISDICTION IS INVOKED

The Court of Appeals rendered its judgment on February 1, 1962. Jurisdiction to review this judgment by writ of certiorari is conferred by the Act of June 25, 1948, ~~46~~ 28 U.S.C. § 1254(1), 62 STAT. 928.

QUESTIONS PRESENTED FOR REVIEW

I.

Is Section 15 of the Shipping Act violated by the failure to file, as distinguished from the carrying out of, agreements?

II.

May the Federal Maritime Commission, at the conclusion of a private complaint proceeding, find the Shipping Act violated in ways and at times neither alleged in the complaint nor charged during the hearing?

III.

May the Federal Maritime Commission, more than a year after dismissing a private complaint, reopen the proceeding on the identical record and find portions

of the complaint proven: (a) without giving any reason why the dismissal was wrong, and (b) in disregard of its own Rules which require that such a changed result be based upon a finding that "such action is required by changed conditions in fact or law or by the public interest"?

IV.

Is a person who does not undertake the carriage of cargo a "common carrier" within the meaning of the Shipping Act?

V.

Did the Court of Appeals for the District of Columbia, by affirming findings of the Federal Maritime Commission which have no support in the record, are contrary to all the evidence of record, contrary to the findings of the Examiner, and contrary to an earlier report of the Commission in the same proceeding, so far depart from the duty of review laid down by this Court in Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474 (1951), as to call for an exercise of this Court's power of supervision?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

1. United States Constitution Amendment V.

2. Section 1 of the Shipping Act, 1916, 39 Stat. 728, 46 U.S.C. § 801 (1958).

3. Section 15 of the Shipping Act, 1916, 39 Stat. 733, 46 U.S.C. § 814 (1958).

4. Section 22 of the Shipping Act, 1916, 39 Stat. 736, 46 U.S.C. § 821 (1958).

5. Section 8(b) of the Administrative Procedure Act, 60 Stat. 242, 5 U.S.C. § 1007(b) (1958).

6. Rule 16(a), Rules of Practice and Procedure of the Federal Maritime Commission, 46 C.F.R. § 201.261 (a) (1958).

The pertinent text of these provisions, statutes and rules is set forth in the Appendix to this Petition.

STATEMENT OF THE CASE

The Shipping Act, 1916,[1] is Congress' assertion of regulatory power over carriers and handlers of the ocean-borne foreign commerce of the United States. Subject to the jurisdiction of that Act are all common carriers by water in our foreign commerce—be they American or foreign in nationality—and any person carrying on specified shore-based activities.

Section 15 of the Shipping Act[2] states that agreements or arrangements between those subject to that Act shall be filed for the approval of the Federal Maritime Commission,[3] and further provides that "before approval or after disapproval it shall be unlawful to carry out" any agreement required to be filed for approval.

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[1] 39 Stat. 728, 46 U.S.C. §§ 801-842 (1958), as amended, 46 U.S.C. §§ 802, 817b (Supp. II, 1958).

[2] 39 Stat. 733, 46 U.S.C. § 814 (1958).

[3] Hereinafter referred to as "the Commission." At all times pertinent to this case, the agency below was the Federal Maritime *Board*, but Reorganization Plan No. 7 of 1961 created the Commission as successor to the Board, and references herein will be made to the agency below as "the Commission."

Petitioners are eight steamship companies: seven British, one Canadian.[1] In October, 1957, petitioners submitted for Commission approval a proposed conference agreement to fix rates and conditions for the carriage of ocean cargo in the westbound trade from the United Kingdom and Eire to United States ports on the Great Lakes (R. 19). Petitioners requested early approval so that they could begin conference operations with the advent of the 1958 Great Lakes shipping season, after the Spring thaw of the ice in the St. Lawrence. In preparation for such conference operation, petitioners caused to be prepared a draft tariff listing commodities and rates to be charged after approval of the conference was received. The compilation of this draft tariff was begun in late 1957, and petitioners so advised the Commission. (Ex. 100; R. 316).

Approval of petitioners' conference agreement was opposed by a group of foreign steamship companies (hereinafter referred to as complainants) which were already serving the Great Lakes as members of a conference. In addition to this opposition, complainants filed with the Commission pursuant to Section 22 of the Shipping Act a complaint dated March 31, 1958 (R. 45). The complaint alleged that during the first three months of 1958 all petitioners had "jointly agreed upon and adopted" a tariff for the trade from the United Kingdom to U. S. Great Lakes ports "without the Board's approval of such agreement," and that peti-

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[1] British: Anchor Line Limited; The Bristol City Line of Steamships, Ltd.; The Cunard Steamship Company, Limited; Ellerman's Wilson Line, Limited; Furness, Withy & Company, Limited; Manchester Liners Limited; and the Ulster Steamship Company Limited (Head & Lord Line).

Canadian: Canadian Pacific Railway Company.

tioners "notified various shippers" of and loaded cargo at these rates. The complaint alleged further that three petitioners—Head Line, Anchor Line, and Bristol City Line—had entered into and carried out an unapproved agreement to pool vessels and alternate sailings "from the port of Glasgow, Scotland, for the 1958 navigation season."

Petitioners denied these allegations (R. 50), the Commission assigned the matter Docket No. 833, and a hearing was held before an Examiner during October 1958. During the early stages of the hearing, the complaint was amended to allege further that petitioners were parties to unapproved agreements allocating ports on the Great Lakes (R. 66); and the Examiner ruled that the complaint and amendment (and thus the hearing) covered only activities subsequent to January 1, 1958 (R. 72).

In a Recommended Decision dated May 18, 1959, the Examiner found that complainants' allegations had not been proven, and recommended that the complaint be dismissed (R. 399). Complainants appealed this ruling to the Commission, and by decision reached December 14, 1959, the Commission (comprised of Chairman Morse and Members Guill and Stakem) affirmed the Examiner, held that no violations of the Shipping Act had been proven, and dismissed the complaint (Member Stakem dissenting) (R. 425).

Thereafter, on or about May 2, 1960, pursuant to the provisions of the Review Act of 1950, 64 Stat. 1129, 5 U.S.C. §§1031-1042 (1958), complainants petitioned the Court of Appeals for the District of Columbia for review of the Commission's dismissal of the complaint (R. 461), in which action petitioners intervened. On

September 19, 1960, while complainants' petition for review was still pending, the Commission on its own motion reopened the complaint proceeding for reconsideration limited to the existing record (R. 464). By this time, the two Commission members who had voted to dismiss the complaint had resigned, two new members had taken their place, and the dissenter—Thomas E. Stakem—had become Chairman.

The newly constituted Commission heard reargument on November 30, 1960. Within a week, the Commission filed a motion with the Court of Appeals to dismiss complainants' petition for review (R. 465). This motion was immediately opposed by petitioners in a written answer a copy of which was served on the Commission, in part on the ground that the Commission could not modify or set aside its dismissal of the complaint without satisfying the conditions of Commission Rule 16 (a), i.e., unless "it finds such action is required by changed conditions in fact or law or by the public interest." (R. 467). The Court of Appeals denied the Commission's motion to dismiss (R. 472).

Thereafter, in a report and order served January 24, 1961, the Commission, without reference to or discussion of the conclusions of the Examiner and previous Commission, found that certain of complainants' allegations had been proven, but made none of the findings required by its Rule 16(a) (R. 479). Petitioners were found to have entered into agreements which were not filed for approval under Section 15 of the Shipping Act, and for which petitioners would be liable to the prescribed Section 15 penalties, the matter to be transmitted to the Department of Justice for appropriate action. The prescribed penalty is "not more than

$1,000 for each day such violation continues." 75 Stat. 763, 46 U.S.C.A. § 814 (Supp. 1961).

In the Commission's report, petitioners were found "to have violated the requirement as to the immediate filing of agreements" in three respects: (1) beginning April 1, 1958 concerning an agreement between all petitioners regulating transportation rates; (2) beginning February 3, 1958 concerning an agreement between Anchor Line, Head Line and Bristol City Line alloting the ports of Glasgow, Bristol City, Avonmouth and Liverpool, and regulating sailings therefrom; and (3) beginning February 18, 1957 concerning an agreement between Cunard, Furness, and Canadian Pacific allotting and alternating sailings to U. S. Great Lakes ports. (R. 4[illegible]-98).

Petitioners sought review of the Commission's Report and Order in the Court of Appeals for the District of Columbia. Among the Commission errors urged were the following: (1) Failure to give any reason why the Examiner and earlier Commission were wrong, and failure to make any of the findings prerequisite to a changed decision as required by Commission Rule 16 (a); (2) Finding that petitioners violated Section 15 of the Shipping Act in ways and at times neither alleged in the complaint nor charged during the hearing; (3) Construing Section 15 as violated by the failure to file, as opposed to the carrying out of, agreements; (4) Finding petitioner Anchor Line to be a common carrier within the meaning of the Shipping Act, and (5) The absence in the record as a whole of substantial evidence supporting the Commission's report.

The Court of Appeals for the District of Columbia affirmed the Commission's Report and Order by deci-

sion of February 1, 1962 (A. 1-A. 3), but in so doing ruled upon only two of the five asserted errors above-summarized: (1) Any Commission error with respect to its Rule 16(a) had not been "raise[d] * * * before the Commission and we find no compelling reason to consider it," and (2) The Commission's report and order "cite ample evidence and reasons to support the Commission's conclusions." The remaining errors asserted before that court concerning the construction of Section 15 of the Act, the findings of violations neither alleged nor charged, the failure to give any reason for the changed result, and the status of Anchor Line as a "common carrier", were not discussed or ruled upon in its opinion.

REASONS FOR ALLOWANCE OF THE WRIT

INTRODUCTION

The United States stands unique among nations in its regulation of international ocean shipping. In 1916, with the passage of the Shipping Act, the United States asserted regulatory power over the steamship industry which no other nation, before or since, has seen fit to do. Today, some 335 foreign-flag and 35 American-flag steamship lines carry cargo to and from the United States, making the nature of American regulation of ocean trade a subject of serious concern to the steamship industry generally and to foreign nations whose citizens and vessels are affected.

Recent developments have increased the gravity of the concern felt by all those whose activities are being subject to regulation. First, the agency administering that law has so acted in a punitive proceeding as to raise serious question of the fairness and legality of its exercise of delegated power. Second, this very

agency recently has been spurred by the President and Congress to increase its regulatory activity, giving substantial promise of the frequent repetition of those actions which have caused such serious concern.

All but one of the questions presented by this case are so fundamental to the administration of the Shipping Act that their resolution will furnish needed guidelines not only to the 1730 carriers, forwarders and terminal operators subject to that Act, but also to the agency charged with this exercise of federal power. The last of the questions presented herein calls for a reaffirmation of the duties of the Courts of Appeals on review of the substantiality of evidence supporting an agency decision.

I.

Is Section 15 of the Shipping Act Violated By the Failure to File, as Distinguished From the Carrying Out of, Agreements?

Section 15 is often referred to as the heart of the Shipping Act. By its terms, it applies to "every agreement * * * or modification or cancellation thereof" to which any person subject to the Act "may be a party or conform in whole or in part" and which deals with any of a number of enumerated aspects of the shipping industry[5] "or in any manner provid[es] for an exclusive, preferential, or cooperative working arrange-

[5] "Fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried."

ment." Such agreements are required to be filed for the approval of the Federal Maritime Commission; before such approval, "it shall be unlawful to carry out, in whole or in part, directly or indirectly, any such agreement, modification or cancellation," the monetary penalty for such violation to be imposed "for each day such violation continues."

With the penalty measured by the day, the question of what constitutes a "violation" is obviously of grave importance to all those subject to the Shipping Act. For more than forty years following the passage of that Act, the administering agencies construed Section 15 as "violated" when an unapproved agreement was carried out. In 1961, however, in the proceeding which has caused this petition, the Federal Maritime Commission found for the first time that Section 15 was "violated" on and after the day an agreement was made, even though no action was found to have taken place pursuant to the agreement until days, weeks, or months later.

The impact of the new construction of Section 15 upon petitioner Canadian Pacific Railway Company is illustrative. Although the Commission found that this petitioner entered into an agreement about "departures and port calls" in its service between the United Kingdom and U. S. Great Lakes ports, and that this agreement "must have become final at the latest by February 18, 1957" (R. 497), the undisputed evidence of record (Exs. 81, 82; R. 296, 305) reveals that Canadian Pacific began its first voyage from the United Kingdom to the U.S. Great Lakes on October 9, 1957—two hundred and thirty-three days after its "agreement must have become final." If the Section 15 penalty is meas-

ured at the maximum $1,000-per-day,[6] this petitioner faces a fine of $233,000 for a period during which it made no sailings to U.S. Great Lakes ports and could not possibly have carried out the alleged agreement about "departures and port calls."

Other such discrepancies between dates of "agreement" and dates when one or more petitioners were found to have first acted raise the possibility of additional fines totaling $37,000 (the seven-carrier rate-fixing "agreement") and $38,000 (the other three-carrier "agreement" as to ports and calls).

And further, the frozen condition of the St. Lawrence gateway to the Great Lakes during the Winter season gives added impact to the seriousness of the Commission's novel construction of Section 15. If petitioners each may be fined for failing to file agreements which none of them *could* have carried out during Winter months, then these petitioners face a collective maximum fine of $2,280,000 for "days" when no sailings were or could have been made.[7]

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[6] For forty-five years, the penalty for a violation of Section 15 was "$1,000 for each day such violation continues." 39 Stat. 733, 46 U.S.C. § 814 (1958). Last year, Congress amended Section 15 to allow the imposition of a fine of "not more than $1,000 per day for each day such violation continues." 75 Stat. 763, 46 U.S.C.A. § 814 (Supp. 1961).

[7] $1,000-per-day maximum fine x 120 (days each Winter) x 7 (petitioners alleged to be parties to rate-fixing agreement) = $ 840,000

$1,000-per-day maximum fine x 120 (days each Winter) x 6 (petitioners alleged to be parties to departure & port call agreements) x 2 (such alleged agreements) = 1,440,000

$2,280,000

Whether the Commission's novel construction of Section 15 is permissible is the question petitioners ask this Court to answer. But they are not alone in their concern about the Commission's new view of Section 15. There are approximately 341 respondents in 13 currently pending Commission investigations of alleged unapproved Section 15 agreements who are all equally likely to feel the impact of this administrative law-making.[9]

The fact that 335 foreign-flag carriers are subject to the reach of Section 15 makes the construction and administration of that Section important to all maritime nations, whose interest and concern was manifested last year when twelve of those nations submitted comments through the Department of State to committees of Congress[10] during the consideration and passage of

[9] See, for example, the following recent Commission decisions: Docket 882 "Unapproved Section 15 Agreements South African Trade," served April 10, 1962, where the Hearing Examiner is reversed and the new construction of Section 15 applied to find respondents guilty of violating Section 15; Dockets 920 and 920 (Sub 1.) "States Marine Lines, Inc. and Global Bulk Transport Corp. v. Transpacific Freight Conference of Japan," served April 17, 1962, where the failure to file an agreement for approval and the carrying out of the agreement without approval were held to be "both distinct violations of section 15 of the Act."

[10] Belgium, Denmark, Federal Republic of Germany, Finland, France, Italy, Japan, Netherlands, Norway, Philippines, Sweden, United Kingdom.

[11] Hearings before the Special Subcommittee on Steamship Conferences of the House Committee on Merchant Marine & Fisheries on H.R. 4299, 87th Cong., 1st Sess. (1961) at 161-64; 235-36; Hearings before the Merchant Marine & Fisheries Subcommittee of the Senate Committee on Commerce, 87th Cong., 1st Sess. (1961) at 51-69, 189.

certain amendments to the Shipping Act. Notably, some proposed amendments—including a suggested change in Section 15—were rejected by the Congress, at the advice of our Department of State, so as not to "do violence to our foreign policy."[11]

And finally, until there is an authoritative resolution of this important and recurring problem in the administration of the Shipping Act, the more than 1700 steamship companies, forwarders and terminal operators subject to the terms of Section 15 must either conduct their affairs in accordance with the Commission's latest interpretation of that Section or—by relying upon the former construction of that Section—run the risk that the Commission will institute punitive proceedings with their inevitable stigma and threat of heavy fine. All those subject to Section 15 should promptly know whether Section 15 is violated even though an agreement is not carried out. This issue and the Commission's erroneous construction of Section 15 were urged as error before the Court of Appeals for the District of Columbia, but that court failed to discuss or rule upon this important question of federal law which has not been, but should be, settled by this Court.

II.

May the Federal Maritime Commission, At the Conclusion of a Private Complaint Proceeding, Find That the Shipping Act Has Been Violated In Ways and At Times Neither Alleged In the Complaint Nor Charged During the Hearing?

Section 22 of the Shipping Act permits a private party to file a sworn complaint "setting forth any violation" of that Act, and requires the Commission, if the complaint is not satisfied, to "investigate it in such

[11] S. Rep. No. 860, 87th Cong., 1st Sess. (1961) at 25.

manner and by such means, and make such order as it deems proper." Section 22 also provides that the Commission, on its own motion, may investigate any violation of the Act, but in this case the Commission chose not to institute its own investigation. The private complaint, therefore, as the "vehicle for the vindication of private rights", cf. *National Labor Relations Board* v. *Fant Milling Company*, 360 U.S. 301, at 307 (1959), framed the factual and legal issues. It was thus incumbent upon the Commission to confine any findings of violation and its cease and desist order to the allegations of the complaint and any other charges made during the hearing.

Nevertheless, the Commission, in its second Report and Order, found petitioners to have violated Section 15 of the Act in ways and at times neither alleged in the private complaint nor charged during the hearing.

First, the Examiner ruled during the hearing that all the allegations of the complaint and its amendment "relate * * * to the period subsequent to January, 1958" (R. 70)—yet the Commission found that an agreement between three petitioners was reached and the Act violated starting in February, 1957 (R. 497), some eleven months earlier.

Second, the complaint accused three petitioners of entering into an agreement concerning pooling of vessels and alternating sailings from the port of Glasgow (R. 47), and no expansion of this charge was made during the hearing—yet the Commission found that this agreement dealt as well with the ports of Liverpool, Bristol City, and Avonmouth (R. 491, 497).

Third, the complaint as amended accused all petitioners of entering into agreements apportioning

among themselves ports in the Great Lakes (R. 66-68), and no further charge was made during the hearing—yet the Commission found that such an agreement covered ports in the United Kingdom as well (R. 488) and found also that the agreement covered a distribution of revenues and sharing of expenses (R. 492) which the complaint nowhere alleged.

Petitioners believe that such discrepancies between the allegations of a private complaint and the findings of Shipping Act violations are unauthorized by Section 22 of the Shipping Act which empowers the Commission only to investigate the "sworn complaint setting forth any violation of [the] Act," if the Commission, as here, does not institute an investigation on its own motion. Petitioners also believe that such Commission action is forbidden by Amendment V of the United States Constitution.

Whether the Commission may lawfully proceed beyond the confines of the allegations and charges in finding violations of the Shipping Act, in view of the concommitant and severe penalties which such findings permit to be imposed, is of critical interest not only to petitioners, but to every steamship operator, terminal and freight forwarder subject to that Act. The allegations of a private complaint may cover violations of any of nine sections of the Shipping Act, with the range of prescribed criminal penalties running from $5,000 to $25,000,[12] the maximum civil penalties measured at

[12] *Section 11:* "misdemeanor punishable by a fine of not more than $25,000 for each offense";

Sections 14(a), 17, 20 and 21: "misdemeanor, punishable by fine not to exceed $5,000" (see Section 32, 46 U.S.C. 831);

Section 16: "misdemeanor punishable by a fine of not more than $5,000 for each offense";

$1,000 per day,[13] and the existing possibility that reparation to the complainant may also be ordered by the Commission as authorized by Section 22. The punitive nature of any such proceeding makes imperative that those charged with violations be given adequate opportunity to prepare and conduct their defense. Also, the fact that the United States is the only nation so to regulate ocean shipping by threat of fine and penalty gives added urgency to the need for a clarification of the Commission's power to find violations of the Shipping Act at the conclusion of a private complaint proceeding.

Petitioners presented this issue to the Court of Appeals for the District of Columbia Circuit, but the opinion of that court wholly failed to discuss or rule upon this important federal question which has not been, but should be, settled by this Court.

III.

May the Federal Maritime Commission, More Than a Year After Dismissing a Private Complaint, Reopen the Proceeding and Find Portions of the Complaint Proven: (A) Without Giving Any Reason Why Its First Action Was Wrong, and (B) In Disregard of Its Own Rules Which Require That Such a Changed Result Be Based Upon a Finding That "Such Action Is Required By Changed Conditions In Fact Or Law Or By the Public Interest"?

In its first report and order in this proceeding, decided December 14, 1959, the Commission affirmed the report of the Hearing Examiner and dismissed the complaint on the ground that the charges had not been proven (R. 452). More than one year later, after a

[13] *Sections 11(b), 15 and 18(b):* "[civil] penalty of not more than $1,000 for each day such violation continues."

change in two of the three Commission members, the Commission found that charges of the complaint had been proven. (A) Where, in a punitive proceeding, an agency thus changes its mind, petitioners believe that the "reasons" required by Section 8(b) of the Administrative Procedure Act, 60 Stat. 242; 5 U.S.C. § 1007 (b) (1958), must include some explanation of why its first report and order were wrong. The Commission gave no such reasons and made no such explanation. (B) According to Rule 16(a) of the Commission, 46 C.F.R. § 201.261(a) (1958), a changed result such as this is permitted only if the Commission "finds such action is required by changed conditions in fact or law or by the public interest". The Commission made no such finding.

A. *Failure to Explain Why the First Result Was Wrong.* Congress, in requiring that "all [agency] decisions * * * shall include a statement of * * * the reasons or basis" for findings and conclusions, 5 U.S.C. § 1007(b) (1958), imposed upon administrative agencies a duty intended to be governed by the type of proceeding. "Statements of reasons," said the House and Senate Reports, "may be as long or short as the nature of the case and the novelty or complexity of the issues may require."[1]

Where, as here, the Commission or any other agency dismisses the complaint in a punitive proceeding after consideration of briefs and oral argument, and then on the identical record reverses itself to find that the law has been violated, petitioners believe the statement

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[1] S. Rep. 572, 79th Cong., 1st Sess. (1945) and H.R. Rep. No. 1980, 79th Cong., 2d Sess. (1946), reprinted in S. Doc. No. 248, 79th Cong., 2d Sess. (1946) at 210 and 273, respectively.

of "reasons" for the second result must include some explanation why the first result was wrong. Certainly, at least this much should be required where the Hearing Examiner has also absolved petitioners from all alleged violations of the Shipping Act—a conclusion reached after a lengthy hearing and his consideration of briefs from all parties.

If an agency may take refuge in silence concerning both its earlier decision and that of the Hearing Examiner, arbitrary or irrational agency action may well be concealed. The requisite "reasons", as the House Report explained, "must be sufficiently related to the record and the law as to advise the parties and any reviewing court of their record and legal basis",[12] and Section 8(b) makes clear that all prior agency or Examiner decisions in a proceeding are a part of that "record" to which the reasons must be related.

No regulatory agency can effectively discharge its delegated responsibilities if its decisions raise the justified suspicion of irrationality. And where Congress has given to an agency responsibilities in the field of international ocean shipping where the mere assertion of unilateral regulation is objected to by foreign sovereigns and their affected citizens, demonstrably rational Commission decisions are vitally important to the effective administration of the Shipping Act.

Petitioners urged before the Court of Appeals for the District of Columbia the error of the Commission in failing to state any reason why its earlier dismissal of the complaint was mistaken, but the court below held without discussion that "the report and order under

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[12] *Ibid.*

review cite ample * * * reasons to support the Commission's conclusions." (A. 3). In this, the Court of Appeals has misconstrued the requirements of the Administrative Procedure Act, an important federal question which has not been, but should be, settled by this Court.

B. *Failure to Make Any Rule 16(a) Finding.* The further question of whether the Commission may change its mind without making any of the findings required by its own Rule 16(a) is fundamental to its power of regulation. The Commission's Rule 16(a) states in pertinent part as follows:

> "The Commission may * * * reopen any proceeding * * * for rehearing, reargument, or reconsideration and * * * may alter, modify, or set aside in whole or in part its report of findings or order therein *if it finds such action is required by changed conditions in fact or law or by the public interest.*" 46 C.F.R. § 201.261(a) (1958). (Emphasis supplied).

Nowhere in the Commission's second Report were any of the required findings made. Petitioners, with all others subject to the Shipping Act, should know, particularly in a punitive proceeding, whether orders of the Commission have at least that finality which Rule 16(a) prescribes, or whether the Commission may act free of the restrictions of its own Rules and overturn the considered decision of a Hearing Examiner and previous Commission merely because new Commission members draw different conclusions from an unchanged record.

To the Court of Appeals for the District of Columbia Circuit below, respondents argued that any Commission error in this respect had been "waived". Peti-

tioners in reply contended: first, that petitioners called attention to the requirements of Rule 16(a) in a document served on the Commission by petitioners long before the issuance of the second report and order (R. 467); and second, even if petitioners had not called the Commission's attention to the requirements of its own Rule 16(a), the absence of such findings in the Commission's report was an error which stripped the Commission of jurisdiction to reverse its earlier dismissal of the complaint—an "irregularity . . . which deprives the [agency] of power or jurisdiction, so that even in the absence of timely objection its order should be set aside as a nullity." *United States* v. *L. A. Tucker Truck Lines*, 344 U.S. 33, at 38 (1952).

The Court of Appeals held that "petitioners failed to raise this objection before the Commission, and we find no compelling reason to consider it." (A. 3). This petitioners urge, was wrong—both because the requirements of Rule 16(a) were called to the Commission's attention before the error was committed, and because the error is of such jurisdictional significance that the Court of Appeals was by law compelled to consider it.

In the past ten years, since the opinion in *Tucker Truck Lines* raised the possibility that certain jurisdictional defects might be non-waivable, one Court of Appeals has so held. *Public Utility District No. 1 of Douglas County, State of Washington* v. *Federal Power Commission*, 242 F. 2d 672 (9th Cir. 1957). That case involved an entire failure to hold a hearing. But certainly, an agency also loses jurisdiction to decide when it silently repudiates both its earlier views and those of the Hearing Examiner and attempts to reverse the dismissal of a punitive complaint without comply-

ing with the conditions prerequisite to such a change of mind. Whether such an agency error is of the type contemplated by *Tucker Truck Lines* is a question the resolution of which will have great impact upon all the Courts of Appeals, administrative agencies, and those subject to the administrative exercise of delegated power. This issue, as well as the power of the Federal Maritime Commission to ignore the jurisdictional restrictions of its own Rules, are important questions of federal law which have not been, but should be, settled by this Court.

IV.

Is a Person Who Does Not Undertake the Carriage of Cargo a Common Carrier" Within the Meaning of the Shipping Act?

Among those subject to regulation by the Shipping Act are common carriers by water in interstate and foreign commerce. The phrase "common carrier by water" is defined by Section 1 of the Shipping Act to mean "a common carrier * * * engaged in the transportation by water of passengers or property * * * on regular routes from port to port." 39 Stat. 728, 46 U.S.C. § 801 (1958).

In its first report below, the Commission concluded that petitioner Anchor Line Limited "had not been shown to have operated as a common carrier in the United Kingdom—United States Great Lakes trade" (R. 431). The Commission based its conclusion on its finding that "there is no indication in the record that any services * * * have actually been operated by Anchor Line," and held that "to qualify as a common carrier, Anchor Line's undertaking to carry must continue, for a certain period of time at least, subsequent to the receipt of goods for the purpose of transporta-

tion. *Agreement No. 7620*, 2 U.S.M.C. 749, 752-3 (1945)." (R. 430-31).

In its second report below, the Commission changed the standard against which common carrier status was to be measured, and found Anchor Line to be a common carrier because it "appears to have held itself out, so far as the public is concerned, as a common carrier." (R. 495).

By so changing the test of common carrier status long after the hearing in a punitive proceeding, the Commission seriously prejudiced petitioner Anchor Line's defense to the charge that it had violated the Shipping Act. Further, because a Section 15 agreement requires the participation of at least two "common carriers," other petitioners each found to have entered into an agreement solely with Anchor Line feel the sudden impact of the latest construction of the statutory phrase "common carrier."

But the significance of the Commission's action will reach far beyond this proceeding. Nothing in the administration of the Shipping Act is more fundamental than the jurisdictional scope of that statute. Whether the jurisdiction of the Commission over "common carriers" encompasses only those who undertake to carry cargo for a period of time subsequent to its receipt for transportation, or whether such jurisdiction extends further to those who "hold themselves out" as carriers but do not carry, is a basic question of federal law for which authoritative resolution is urgently required. It was presented by brief and argument to the Court of Appeals for the District of Columbia, but that court failed to discuss or rule upon it in its opinion.

As the exposition of the preceding questions presented has stressed, the issues in this case are such that they are now and will continue to be vitally important to all the steamship companies, terminal operators and freight forwarders subject to the terms of the Shipping Act and to those who believe they are not subject to that Act. Giving added impetus to the importance of these questions are developments directly attributable to the President's Reorganization Plan No. 7, which created the latest in the long series of agencies administering the Shipping Act.[16] In his message to Congress dated June 12, 1961, the President criticized "serious inadequacies, particularly in the administration of regulatory functions," and adverted to "recent findings by Committees of the Congress."[17] Due to these Congressional critiques and to the President's message, the Chairman of the new Commission has informed Congress of his need for 27 Hearing Examiners—more than twice as many as have been used—plus 60 additional personnel in the regulatory and in-

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[16] United States Shipping Board: 1916-1933; United States Shipping Board Bureau (Department of Commerce): 1933-1936; United States Maritime Commission: 1936-1950; Federal Maritime Board: 1950-1961; Federal Maritime Commission; 1961 to date.

[17] 107 Cong. Rec. 9366 (1961). See, for example, "Steamship Conference Study," Hearings before the Special Subcommittee on Steamship Conferences of the House Committee on Merchant Marine and Fisheries, 86th Cong., 1st Sess. (1959); "Monopoly Problems in Regulated Industries," Hearings on Ocean Freight Industry before the Antitrust Subcommittee of the House Committee on the Judiciary, 86th Cong., 2d. Sess. (1959-60); 87th Cong., 1st Sess. (1961).

vestigative Bureaus alone.[18] Given this clear prospect of increased regulatory activity by the Commission, the need has become even more imperative for a clarification of the definitional phrase "common carrier by water" as used in the Shipping Act, a clear construction of the Section 15 "heart" of that statute, and a definitive resolution of the procedural channels within which the Commission must exercise its powers. If doubt is permitted to continue in these areas, the Commission understandably may be expected to many times repeat the errors discussed herein, giving rise to an ever increasing number of petitions for review: even now, by the Commission's own admission, "practically more than half of the decisions that come out as final orders are taken to court."[19]

Each question presented herein concerns problems fundamental to the administration of the Shipping Act and the Commission's duties and powers thereunder. Petitioners believe there is a great public need for an authoritative resolution of these questions.

[18] Hearings on the Second Supplemental Appropriation Bill, 1962, before the House Committee on Appropriations, 87th Cong., 2d. Sess. (1962) at 140.

[19] *Id.* at 145.

V.

Did the Court of Appeals for the District of Columbia, By Affirming Findings of the Federal Maritime Commission Which Have No Support In the Record, Are Contrary To All the Evidence of Record, Contrary to the Findings of the Examiner, and Contrary To An Earlier Report of the Commission In the Same Proceeding, So Far Depart From the Duty of Review Laid Down By This Court In Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474 (1951), As To Call For An Exercise of This Court's Power of Supervision?

It is more than eleven years since this Court concluded there was "no room for doubt as to the kind of scrutiny which a Court of Appeals must give the record before [an agency] to satisfy itself that the [agency's] order rests on adequate proof. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, at 487 (1951). Petitioners believe that the lesson of that decision needs reaffirmation to prevent departures from that standard such as those revealed by the decision below of the Court of Appeals for the District of Columbia Circuit.

Petitioners do not ask this Court to review findings where there could have been a Court of Appeals decision to affirm the Commission's choice between conflicting evidence. What gravely disturbs petitioners is the Court of Appeals' affirmation of findings which have no support in the record, which are contrary to evidence in the record, and which are contrary to findings of the Hearing Examiner and previous Commission.

As an example, the Commission's conclusion that an agreement to allocate ports existed between three peti-

tioners—Cunard, Furness, and Canadian Pacific—rested basically on three findings:

> "Cunard ships called at both Canadian and Great Lakes ports in the U. S. but Furness ships never called at Canadian ports and Canadian Pacific ships never called at Great Lakes U. S. ports. As regards American ports Cunard ships never called at Chicago." (R. 485).

Although the Commission there found that "Furness ships never called at Canadian ports," the only evidence of record on this point (introduced by *complainants*) shows that Furness ships did call at Canadian ports. (Ex. 117; R. 358-66).

Although the Commission there found that "Canadian Pacific ships never called at Great Lakes U. S. ports," the only evidence of record on this point (introduced by *complainants*) shows that Canadian Pacific ships did call at Great Lakes U. S. ports (Ex. 81, 82; R. 296, 305).

Undoubtedly because all the evidence on this point favored petitioners, the Hearing Examiner and the earlier Commission found the allegations of an agreement to "allocate ports" to be "without merit". (R. 422, 450). When the later Commission reversed its findings and made the findings quoted above, the absence of support in the record for these new findings, and the contrray evidence in the record, were urged before the Court of Appeals for the District of Columbia Circuit which held:

> "We think the report and order under review *cite ample evidence* and reasons to support the Commission's conclusions." (A. 3).

But the report and order "cite" *no* evidence in support of its findings that Furness and Canadian Pacific vessels "never called" at Canadian and U. S. Great Lakes ports, respectively. Had any evidence been cited, it would have shown the contrary.

And even if the Court of Appeals could properly have concluded that the Commission's report and order did "cite ample evidence * * * to support" its findings; the teaching of *Universal Camera*, *supra*, is that the Court of Appeals was also required to take into account "the body of evidence opposed to the [agency's] view," 340 U.S. at 488, "including the examiner's report," 340 U.S. at 493, and, surely, a previous Commission decision, as well.

> "Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting [an agency] decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence * * * the new legislation definitely precludes such a theory of review and bars its practice." 340 U.S. at 487-88.

Had this ruling been obeyed, for example, the Court of Appeals could not have affirmed another of the Commission's findings, this one central to that agency's conclusion that petitioners entered into an agreement to fix rates. After complainants had introduced into evidence 9 letters sent to 4 shippers during a 2-week period in April, 1958—the only evidence of rate uniformity—complainants' own witnesses admitted on cross-examination that competing steamship companies normally charge the same rates (R. 118), and that complainants themselves had charged the same rates as petitioners (R. 109-13; 117). In view of this evi-

dence, the Hearing Examiner and earlier Commission found that "it is the general practice in the shipping industry for one line to meet exactly the rates of its competitors to the extent that they can be ascertained" (R. 415, 441), holding that the evidence of uniform rate quotations was subject to the inference that petitioners "followed the *normal* practice of quoting rates to meet exactly those of their competitors," so that complainants had not proven that uniformity was the result of agreement. (R. 423, 450-51). But in its second report, the Commission concluded, contrary to *all* the evidence and the findings of the Examiner and previous Board, that "independent activity without any understanding *normally* would produce differing and non-conforming actions by each carrier." (R. 490).

The total inconsistency between this finding and the record was urged before the Court of Appeals below. As to this, too, that Court ruled without discussion or explanation that "the report and order under review *cite* ample evidence * * * to support the Commission's conclusions." (A. 3).

The Court of Appeals could have reached this conclusion only if it failed to give the evidence "the kind of scrutiny which a Court of Appeals must give the record * * * to satisfy itself that the [agency's] order rests on adequate proof." *Universal Camera, supra*, 340 U.S. at 487.

Petitioners realize that this Court's power to review the application of the substantial evidence standard "ought seldom to be called into action," and that "this Court will intervene only in what ought to be the rare instance when that standard appears to have been misapprehended or grossly misapplied." 340 U.S. at 490-

91. In this case, petitioners cannot know whether misapprehension of that standard or a gross misapplication thereof led the Court of Appeals to affirm the Commission's findings, report and order. In either case, the action of the court below so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

CONCLUSION

By reason of the foregoing, a writ of certiorari should issue to review the decision of the Court of Appeals herein.

Dated: April 27, 1962.

Respectfully submitted,

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